Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

PROTECT KEY WEST, INC., a Florida Not-for-Profit Corporation, d/b/a Last Stand,

Petitioner,

vs.

LES ASPIN, SECRETARY OF DEFENSE OF THE UNITED STATES OF AMERICA, LAWRENCE H. GARRETT, III, AS SECRETARY OF THE NAVY, FRANK B. KELSO, ADMIRAL, AS CHIEF OF NAVAL OPERATIONS, UNITED STATES NAVY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is 28 U.S.C. § 2412(d)(1)(B) jurisdictional in nature, so that a party seeking an award of fees and other expenses need not appeal a District Court's denial of costs and attorneys' fees which was made prior to the filing of any fee application under 28 U.S.C. § 2412 (d)(1)(B)?

2. Is it reversible error to deny a fee application under 28 U.S.C. § 2412 (d)(1)(A) and 28 U.S.C. § 2412 (d)(1)(B) where the District Court has found the agency's actions, despite a theory of "cure," violated federal law?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Statement of Jurisdiction 2

Statute Involved 2

Statement of the Case 2

Reasons For Granting The Writ 5

A. Timeliness of the Appeals 5

B. Substantial Justification 8

Conclusion 10

TABLE OF CITATIONS

Cases Cited: *page*

Action on Smoking and Health v. C.A.B.,
724 F.2d 211 (D.C.Cir. 1984) 6

Allen v. Secretary of Health & Human Services,
781 F.2d 92 (6th Cir. 1986) 6

Brock v. Writers Guild of America, West, Inc.,
762 F.2d 1349 (9th Cir. 1985) 6, 7

Clifton v. Heckler,
755 F.2d 1138 (5th Cir. 1985) 6

Commissioner, I.N.S. v. Jean,
496 U.S. 154 (1990) 8

Damato v. Sullivan,
945 F.2d 982 (7th Cir. 1991) 6

James v. U.S. Dept. of Housing and Urban Develop.,
783 F.2d 997 (11th Cir. 1986) 7

Myers v. Sullivan,
916 F.2d 659 (11th Cir. 1990) 6, 7

Olson v. Norman,
830 F.2d 811 (8th Cir. 1987) 6

Pierce v. Underwood,
487 U.S. 552 (1988) 8

page

Rawlins v. United States,
686 F.2d 903 (Ct.Cl. 1982) 6

Skip Kirchdorfer, Inc. v. United States,
803 F.2d 711 (Fed.Cir. 1986)..... 7

Statutes Cited:

28 U.S.C. A. § 1254(1) (West 1993)..... 2

28 U.S.C. A. § 1331 (West 1993)..... 2, 3

28 U.S.C. A. § 2412 (West Supp. 1992) 2

28 U.S.C. A. § 2412(d)(1)(A) (West Supp. 1992) 5

28 U.S.C. A. § 2412(d)(1)(B) (West Supp. 1992)... 3, 5, 6

28 U.S.C. A. § 2412(d)(2)(D) (West Supp. 1992)..... 5

42 U.S.C. A. § 4331 *et seq.* (West 1977)..... 9

APPENDIX

Review Sought: *page*

Judgment of the United States Court of Appeals for the Eleventh Circuit Filed December 1, 1993 ..... 1a

Order of the United States District Court for the Southern District of Florida Filed August 13, 1992 ..... 2a

Order of the United States District Court for the Southern District of Florida Filed May 26, 1992 ..... 5a

Other:

Order of the United States District Court for the Southern District of Florida Filed April 10, 1992 ..... 7a

Opinion and Order of the United States District Court for the Southern District of Florida Filed March 30, 1992 ..... 9a

Demand for Relief from Petitioner's Complaint Filed June 4, 1991 ..... 40a

Defendants' Motion for Amendment of March 30 Order Filed April 9, 1993..... 41a

Pertinent text of 28 U.S.C. A. § 2412 (West Supp. 1992) 45a

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October Term, 1993

PROTECT KEY WEST, INC., a Florida Not-for-Profit Corporation, d/b/a Last Stand,

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Florida, in favor of Petitioner but denying costs and attorneys' fees, is reported at 795 F.Supp. 1552 (S.D.Fla. 1992).

The decisions of the United States Court of Appeals for the Eleventh Circuit, affirming without opinion, are reported at 11 F.3d 166 (11th Cir. 1993).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. A. § 1254(1) (West 1993).

STATUTE INVOLVED

28 U.S.C. A. § 2412 (West Supp. 1992). The pertinent text of the statute is set forth in the appendix beginning at page 45a.

STATEMENT OF THE CASE

Petitioner is a non-profit environmental organization with approximately 600 members, located in Key West, Florida. Petitioner filed suit against Respondents, alleging violations of federal environmental law. The United States District Court for the Southern District of Florida had jurisdiction over the merits of the litigation pursuant to the federal question statute, 28 U.S.C. A. §

1331 (West 1993). Petitioner's suit demanded, *inter alia*, "costs of [the] action, including attorneys' fees." (A.40).

After a hearing, the District Court, on March 30, 1992, ordered and adjudged, *inter alia*, that Respondents had violated federal environmental law, that a permanent injunction should issue against Respondents, and that "each party shall bear its own cost and attorneys' fees of this litigation, as Defendants' litigation position was substantially justified." (A.38). Respondents subsequently moved for an "Amendment" of the judgment. (A.41). The motion was granted *ex parte*. (A.7). No appeal was taken from the District Court's judgment, filed March 30, 1992, or from the order amending the judgment, filed April 10, 1992.

Subsequent to the judgment's amendment, Petitioner timely filed, on May 14, 1992, an application for fees and other expenses pursuant to 28 U.S.C. A. § 2412 (d)(1)(B) (West 1992) for the first time. After Respondents filed an opposition to the application, the District Court denied the application, reasoning that "[b]y order dated March 30, 1992, the Court found that the defendant's [*sic*] litigation position was substantially justified." (A.5). Petitioner, on July 23, 1992, timely filed an appeal to the United States Court of Appeals for the Eleventh Circuit from the District Court's order denying the application.

Petitioner then filed a motion with the District Court seeking, *inter alia*, relief from the order denying the application. After Respondents filed an opposition to the motion, the District Court, on August 13, 1992, denied the requested relief, reasoning "[t]he government's

theory of 'cure,' although ultimately rejected by this Court, had a reasonable basis in law and fact." (A.3). Petitioner, on August 31, 1992, timely filed an appeal to the United States Court of Appeals for the Eleventh Circuit from the District Court's order denying relief.

Respondents, on appeal, raised two issues which are pertinent to this Petition:

> 1) Whether the notices of appeal, filed more than 60-days after the District Court's final judgment, as amended, gave the appellate court jurisdiction over the merits of the denial of the application?
>
> 2) Whether the District Court abused its discretion in concluding that the position of the Respondents was "substantially justified" within the meaning of 28 U.S.C. § 2412?

Without opinion, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's denial of the application and the District Court's refusal to grant relief from the denial. (A.1).

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN THIS MATTER WHICH IS IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE SAME MATTER, WHICH CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION. FURTHER, THE DECISION HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A. Timeliness of the Appeals

No application under 28 U.S.C. § 2412(d)(1)(B) was made prior to the District Court's judgment on March 30, 1992, denying costs and attorneys' fees. Consequently, the court did not have before it the information required by the statute, which mandates a showing that Petitioner was "eligible to receive an award"; the amount sought, supported by an itemized statement; and an allegation that the position of the United States was not substantially justified. *See* 28 U.S.C.A. § 2412(d)(1)(B) (West Supp. 1992).

The District Court's judgment did not mention 28 U.S.C. § 2412(d)(1)(B), nor did its reasoning comply with the statute's requirement that fees and other expenses be awarded unless both the government's litigation position and the agency's action were substantially justified. *See* 28 U.S.C. A. § 2412(d)(1)(A) (West Supp. 1992) *and* 28 U.S.C. A. § 2412(d)(2)(D) (West Supp. 1992).

The Petitioner did not view the District Court's judgments of March 30, 1992 and April 10, 1992, rendered prior to any fee application, as determinative of the issue of fees and other expenses under 28 U.S.C. A. § 2412(d)(1)(B) (West Supp. 1992). Rather, in Petitioner's view, the judgments' denial related only to the general request in the Complaint's demand; no appeal on the issue of denial of fees under 28 U.S.C. A. § 2412(d)(1)(B) (West Supp. 1992) was possible. This view in supported by cases citing a District Court's lack of subject matter jurisdiction prior to a timely fee application.

Several United States courts of appeal have held that a court lacks subject matter jurisdiction where it attempts to grant an award of fees under 28 U.S.C. § 2412(d)(1)(B) absent a timely application. The Fifth Circuit has held "that the statutory time limitation, as an integral condition of the sovereign's consent to be sued, is a jurisdictional prerequisite to an award of fees..." *Clifton v. Heckler*, 755 F.2d 1138, 1144-45 (5th Cir. 1985)(footnote omitted). *Accord Allen v. Secretary of Health & Human Services*, 781 F.2d 92, 94-5 (6th Cir. 1986); *Damato v. Sullivan*, 945 F.2d 982, 986 (7th Cir. 1991); *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Brock v. Writers Guild of America, West, Inc.*, 762 F.2d 1349, 1360 (9th Cir. 1985); *Myers v. Sullivan*, 916 F.2d 659, 666 (11th Cir. 1990); *Action on Smoking and Health v. C.A.B.*, 724 F.2d 211, 225 (D.C.Cir. 1984); *Rawlins v. United States*, 686 F.2d 903, 914 (Ct.Cl. 1982).

The Ninth Circuit has held that a district court's *sua sponte* award of fees was reversible error. *Brock*, 762 F.2d at 1359-60. The court reasoned that "[s]ection 2412(d)(1)(B) plainly states that the filing of an application for fees is a prerequisite to a fee award." *Id.* at 1360.

The Federal Circuit has characterized 28 U.S.C. § 2412(d)(1)(B) as other than jurisdictional, characterizing the thirty day period as "a 'statute of limitations' against fee awards." *Skip Kirchdorfer, Inc. v. United States*, 803 F.2d 711, 712 (Fed.Cir. 1986). The characterization is echoed in *James v. U.S. Dept. of Housing and Urban Develop.*, 783 F.2d 997, 999 (11th Cir. 1986)("The thirty-day time limit for filing a fee application should serve as a statute of limitations, not as a trap for the unwary.").

If the Eleventh Circuit here viewed the District Court's denial of a general request for costs and attorneys' fees as determinative of the issue of all fees and costs, including those under 28 U.S.C. § 2412(d)(1)(B), so that the District Court's judgment must be appealed, the decision is surely a "trap for the unwary." *But see Myers*, 916 F.2d at 668 (requirement not designed as a trap for the unwary)(citing *James*, 783 F.2d at 999). Such a view of the District Court's denial of a general cost and fee demand would also counter Congressional intent that the filing requirement of 28 U.S.C. § 2412(d)(1)(B) be interpreted broadly to prevent unwarranted denial of fees. *Myers*, 916 F.2d at 671.

Where, as here, a statute mandates an application prior to a grant, applicants are denied the benefits Congress intended if courts can validly deny the grant

absent an application and without reference to the statute. Under the reasoning affirmed by the Eleventh Circuit, Petitioner would be forced to appeal any general denial, although the lower court lacked any subject matter jurisdiction over a potential application neither referenced in a demand nor mentioned in the denial. Likewise, a potential applicant would be forced to appeal a *sua sponte* award made under other federal statutes which allow awards of fees and costs, if the amount awarded did not meet or exceed the potential applicant's estimation of the amount which could be claimed under 28 U.S.C. § 2412(d)(1)(B).

Granting of the writ would thus aid applicants under 28 U.S.C. § 2412(d)(1)(B) and the courts of appeal by defining the nature and requirements of the statute.

B. Substantial Justification

The District Court's orders denying Petitioner's application are contrary to this Court's decision in *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990). There, this Court stated that 28 U.S.C. § 2412 (d)(1)(B) "*directs* a court to determine whether the Government's past position was substantially justified 'on the basis of the record (*including the record with respect to the action or failure to act by the agency upon which the civil action is based*)..." *Commissioner, I.N.S.*, 496 U.S. at 159-60 (emphases added)(citation omitted). The decisions are also contrary to *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988)(substantial justification is such that "a reasonable person could think...it has a reasonable basis in law and fact.").

The District Court's judgment belies any assertion that the agency's actions were substantially justified under 28 U.S.C. § 2412(d)(1)(A) and 28 U.S.C. § 2412(d)(2)(D). The District Court found that the agency action was "wholly inadequate" under the National Environmental Policy Act, 42 U.S.C. A. § 4331 *et seq.* (West 1977) ("NEPA") when compared "with what is required by law..." (A.26). Further, the agency action "fails to meet the requirements of NEPA." (A.27). The court also concluded that the Respondents' "theory of 'cure' in this case would violate the letter and spirit of NEPA." (A.31). Accordingly, the District Court issued a permanent injunction against the Respondents.

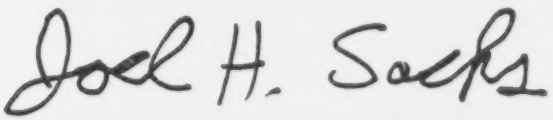
Thus, the District Court's denial of Petitioner's application because "the government's theory of 'cure,' although ultimately rejected by this Court, had a reasonable basis in law and fact" is in direct conflict with *Pierce*. If the Eleventh Circuit affirmance was based on Respondents being substantially justified, it is, given the District Court's findings, clearly in conflict with the decisions in *Jean* and *Pierce*.

Granting of the writ would therefore allow this Court to reaffirm the requirement that a substantially justified litigation position alone is not sufficient for a denial under 28 U.S.C. § 2412(d). Granting of the writ would also allow this Court to decide whether an agency action which is found to violate federal law is, *per se*, not substantially justified.

CONCLUSION

Granting of the writ would clarify for the United States courts of appeal whether 28 U.S.C. § 2412(d)(1)(B) is jurisdictional in nature or is simply a "statute of limitations" to be rigidly enforced. Granting of the writ would allow the Court to affirm *Pierce* and *Jean*, while further defining "a reasonable basis in law and fact".

Respectfully submitted,



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Dated: February 25, 1994

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 92-4707, 92-4839

D.C. Docket No. 91-10054-Civ-JLK

PROTECT KEY WEST, INC., A Florida NOT-FOR-PROFIT CORPORATION, d/b/a LAST STAND,

PLAINTIFF-APPELLANT,

VERSUS

LES ASPIN, SECRETARY OF DEFENSE OF THE UNITED STATES OF AMERICA, LAWRENCE H. GARRETT, III, AS SECRETARY OF THE NAVY, FRANK B. KELSO, ADMIRAL, AS CHIEF OF NAVAL OPERATIONS, UNITED STATES NAVY,

DEFENDANTS-APPELLEES.

Appeals From The United States District Court
for the Southern District of Florida

(December 1, 1993)

Before FAY, Circuit Judge, DYER and REAVLEY*, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10054-CIV-KING

Protect Key West, Inc.,
a Florida Not-for-Profit
Corporation, d/b/a
LAST STAND

Plaintiff,

v.

RICHARD CHENEY, Secretary of Defense
of the United States of America,
H. LAWRENCE GARRENT III, as
Secretary of the Navy, and ADMIRAL
FRANK B. KELSO, as Chief of Naval
Operations, United States Navy,

Defendants.

_____/

OMNIBUS ORDER ON PLAINTIFF'S MOTION
FOR RECONSIDERATION

THIS CAUSE comes before the Court on Plaintiff's "Motion to Amend Application for Fees and Other Expenses under the Equal Access to Justice Act and Motion for Relief from Order Denying Plaintiff's Application for Attorneys' Fees" and "Motion for Leave to Proceed on Appeal in Forma Pauperis." Upon

consideration, the Court hereby ORDERS AND ADJUDGES:

1. Plaintiff's Motion to Amend be and the same hereby is GRANTED. Plaintiff's Application for Fees and Other Expenses Under the Equal Access to Justice Act, filed May 14, 1992, is deemed amended for all proper purposes to include a cost of transcripts in the amount of $739.00.

2. Plaintiff's renewed motion for reconsideration of this Court's order denying attorneys' fees under the Equal Access to Justice Act be and the same hereby is DENIED. As set out in two previous Orders, the government's position was substantially justified in these proceedings. The government's theory of "cure," although ultimately rejected by this Court, had a reasonable basis in law and fact. Plaintiff shall have ten (10) days from the date of this Order to file a notice of appeal, pursuant to Fed. R. App. P. 4.

3. Plaintiff's motion for leave to proceed on appeal in forma pauperis be and the same hereby is GRANTED pursuant to Fed. R. App. P. 24. The Court has reviewed the affidavit of Anthony R. Marchione, Treasurer of Protect Key West, Inc., and finds that the plaintiff organization has a negative net worth. Plaintiff has no property or other assets, and gets no income from sales. Therefore, Plaintiff is entitled to proceed in forma pauperis under the appellate rules.

DONE and ORDERED in chambers at the United Stated District Courthouse, Federal Courthouse Square, Miami, Florida, on this 13th day August, 1992.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Teresa Davenport, AUSA
Pauline H. Milius, Esq.
Joel Sachs, Esq.
Leonard Sands, Esq.
Herbert Walker, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10054-CIV-KING

PROTECT KEY WEST, INC., et al.,

Plaintiff,

v.

RICAHRD CHENEY, et al.,

Defendant.

_____/

ORDER DENYING PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES

This cause came before the court upon plaintiffs application for attorneys' fees.

By order dated March 30, 1992, the Court found that defendant's litigation position was substantially justified. It is therefore

ORDERED, ADJUDGED and DECREED that the instant application for attorneys' fees be, and the same is hereby, DENIED.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 26th day of May, 1992.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Teresa Davenport, AUSA
Pauline H. Milius, Esq.
Richard Eddy, Esq.
Joel Sachs, Esq.
Leonard Sands, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10054-CIV-KING

PROTECT KEY WEST, INC.,
a Florida Not-for-Profit
Corporation, d/b/a
LAST STAND

Plaintiff,

v.

RICHARD CHENEY, Secretary of Defense
of the United States of America,
et al.,

Defendants.

_____/

ORDER OF CLARIFICATION

THIS CAUSE came before the Court on Defendants' Motion for Amendment of this Court's Order of March 30, 1992.

Upon consideration, the Motion is hereby GRANTED in part. The final sentence on page four is amended to state, "The Court finds that this project, known as Peary Court, is a major federal action."

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, on this 10th day of April, 1992.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc:

ALL COUNSEL OF RECORD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10054-CIV-KING

PROTECT KEY WEST, INC.,
a Florida Not-for-Profit
Corporation, d/b/a
LAST STAND

Plaintiff,

v.

RICHARD CHENEY, Secretary of Defense
of the United States of America,
H. LAWRENCE GARRETT III, as
Secretary of the Navy, and ADMIRAL
FRANK B. KELSO, as Chief of Naval
Operations, United States Navy,

Defendants.

_____/

OPINION, ORDER OF REMAND, ORDER OF INJUNCTION, AND FINAL ORDER OF DISMISSAL WITH JURISDICTION RETAINED TO ENFORCE

THIS CASE was tried, by agreement of the parties and pursuant to Fed. R. Civ., P. 65 (a)(2), on March 12, 1992 in a non-jury final hearing on all issues. This Memorandum Opinion, incorporating findings of fact and conclusions of law and final decree, is entered after

careful consideration of the record, the evidence introduced during the trial, the oral argument of counsel, and the briefs of the parties.

Plaintiff Protect Key West, Inc., d/b/a Last Stand ("Protect Key West") filed this action on June 4, 1991, against Defendants Richard Cheney, Secretary of Defense of the United States of America; H. Lawrence Garrote III, as Secretary of the Navy; and Admiral Frank B. Kelso, as Chief of Naval Operations, United States Navy. The Complaint alleged that the Defendants had violated the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321 et seq.; regulations of the Council on Environmental Equality ("CEQ") for implementing NEPA, 40 C.F.R Part 1500 et seq.; regulations of the United States Department of Defense for implementing NEPA, 32 C.F.R. Part 214; regulations of the United States Department of the Navy for implementing NEPA, 32 C.F.R Part 774; and the Federal Coastal Zone Management Act of 1982 ("CZMA"), 16 U.S.C. §§ 1451 et seq. The Complaint sought an injunction against the further governmental action until the Navy complied in full with the regulations set out above.

The alleged violations center around the Navy's preparation of an Environmental Assessment ("EA") dated September, 1988 for a housing project known as Peary Court, located in the City of Key West, Florida (the "City"). Plaintiff contends that the EA, the Finding of No Significant Impact ("FONSI") published in a City newspaper on February 6 through 8, 1989, and the Navy's decision to build on Peary Court violate the letter and spirit of NEPA, regulations implementing NEPA and

CZMA. The Navy answers that all of its actions and decisions are in full compliance with federal law.

On December 17, 1991, Plaintiff filed a motion for preliminary injunction. By order dated December 19, 1991, this Court referred the motion to Magistrate Judge Stephen T. Brown for a Report and Recommendation. After an evidentiary hearing on the motion on February 6 and 7, 1992, Magistrate Judge Brown recommended denial of preliminary injunctive relief on February 25, 1992. Plaintiff subsequently moved for a temporary restraining order ("TRO"), alleging that "mobilization" was commencing and construction imminent. This Court granted the TRO on March 6, and set a trial on the merits for March 12, 1992.

At the trial, the parties introduced documentary evidence, including the administrative record ("AR"), and record from the hearing held by Magistrate Judge Brown. The Court heard from Dennis Wardlow, Mayor of the City of Key West, as amicus curiae in his personal capacity.

FINDINGS OF FACT

I. BACKGROUND

At issue in this cause is the construction of 160 homes for military personnel on Peary Court, a 28.65-acre parcel of land located in Key West, Florida. (AR 11) It is a part of the Trumbo Point Naval Air Station situated east of White Street and south of Palm Avenue, across from the main entrance to Trumbo Annex.

Although not included in the City's Historic District, the property abuts the District on two sides. (AR 45, 125)

The site was used as United States Army barracks for approximately 120 years, from 1831 to 1951. (AR 180) In 1951 the barracks were demolished and housing for Navy personnel was constructed on the site ("Wherry Housing"). In 1974, Wherry Housing was demolished and most of the site was cleared, with the exception of the streets and some concrete foundations. (AR 63) The land is currently vacant except for a small Credit Union building which occupies 0.8 acres. (AR 8)

From 1974 through 1985, Naval Air Station Key West ("NAS Key West") granted the City a series of one-year leases. In 1985, the Navy granted the City a five-year lease. (AR 8, 63,114) The City utilized the property primarily for recreational purposes, constructing a central ballfield on the property shortly after obtaining the license and a smaller ballfield several years later. (AR 63) In addition, the City requested and was given permission to use the site for a recycling center, among other things. (AR 8) When the City's license expired in November, 1990, the Navy requested the City to vacate the site. (AR 144)

The administrative record reflects the Navy's longstanding plans to reconstruct military housing on the site (AR 10: Master Plan for Naval Complex, dated Sept. 1981) On July 1,1987, the Navy and Coast Guard entered into an agreement by which the Coast Guard would seek to fund the construction of 226 units of family housing on the Navy-controlled property. (AR 26) The Navy would build, manage, and maintain the units

and they would be made available to families of all the military services in the Key West area. (AR 13) Thereafter the Navy determined to construct such housing for some 160 families. (AR 13, 26, 31)

The Court finds that this project, known as Peary Court, is a major federal action that will significantly affect the environment.

In preparation for the Peary Court Project, the Navy prepared an Environmental Assessment ("EA"). (AR 45) The sufficiency of this EA is the focus of the present action. A draft EA was prepared in April 1988. (Exh. T, #8) The final EA is dated September 1988. (AR 45)

On December 22, 1988, the Chief of Naval Operations informed the Naval Facilities Engineering Command in Charleston, South Carolina, that the EA had been reviewed and a determination made that preparing an Environmental Impact Statement ("EIS") was not required. (AR 58) Accordingly, the direction was given to publish Notice of Finding of No Significant Impact ("FONSI") and the availability of the EA in the local Key West newspaper. (AR 58, 61) This publication was made in the Key West Citizen on February 6, 7, and 8, 1989. (AR 67) The notice stated that an EA had been prepared, and that the Navy would forego preparation of an EIS. The notice also specified how interested parties could obtain a copy of the EA.

Only one request was made for the EA. Then-Commissioner Harry Powell requested and received a copy of the EA on February 8, 1989. (AR 73) No written

comments were submitted to the Navy regarding the EA or FONSI in response to the publication.

At the public hearing held on the proposed project on May 31,1990, a number of people attended and spoke, including Commissioner Harry Powell, Sharon Wells, Mayor Anthony Tarracino, and Theodore Strader. (AR 107)

II. LEAD AGENCY

The Court finds that the Navy is the appropriate lead agency for the Peary Court project. The Navy owns the property and is ultimately responsible for its disposition.

III. THE EA

The EA is an 11-page document including three pages of maps. It consists of an introduction, four discussion sections, and a conclusion. (AR 45) The EA is attached as an exhibit hereto.

The EA first discusses the need for housing, noting among other things that increased tourism and lack of developable land in the Florida Keys had substantially increased rents and adversely affected housing availability in the Key West area. (AR 45)

Section II is entitled "Alternatives." The EA first describes the proposed action, addresses alternative sites, and explains why "no action" has been eliminated. (AR 45)

Section III of the EA is called "Affected Environment" and describes the site physically, explaining the environmental conditions of Key West generally. (AR 45)

Section IV, "Environmental Consequences," lists nine areas of environmental effect (Biological Resources, Noise, Air, Hydrology, Cultural Resources, Traffic and Circulation; Land Use and Visual Resources, Socioeconomics, and Energy Resources). Each of these consists of one-sentence to one-paragraph statements that there will be no significant adverse result from the project. (AR 45)

Finally, the EA concludes that the project would not significantly affect the environment. (AR 45)

Plaintiff has alleged several deficiencies in the EA, addressed below.

IV. STORMWATER RUNOFF

In the "Land Use and Visual Resources" section, the EA states that "permits relating to storm water . . . will be obtained." (AR 45) In the "Hydrology" section, the EA notes that "[d]rainage can be handled through the existing system with minor improvements." (AR 45)

While the EA was being prepared, the Navy, In August, 1988, met with the City Engineer for the City to discuss the existing drainage at the Peary Court site and other requirements. (AR 236, Part 7-147) In addition, the Navy had a Site Engineering Investigation Report prepared for the Peary Court site which included a topographic survey, geotechnical investigation, utilities

investigation, and a storm water management report. This report is a part of the Navy's Request for Proposal ("RFP"), through which the Navy conveys to the design and construction contractors the technical specifications that must be met. (AR 236, Part 7)(not dated) The stormwater management report states that a surface water permit will be needed from the South Florida Water Management District ("SFWMD") and that the storm drainage must be designed and constructed in accordance with the "Basis of Review for Surface Water Management Permits Applications" within the SWFMD. (AR 236, Part 2-19, Part 7-18) The SFWMD is charged with identifying the significant environmental features of the project which relate to water resources, evaluate the impact of the project on those water resources, and either issue or deny a permit application. (AR 236, Part 7-199) SFWMD's responsibility in the permit process is to ensure that the applicant's proposed design will not be harmful to water resources or inconsistent with the public interest. (AR 236, Part 7-193) The Navy's contractor has applied for a permit and has submitted its drainage system design to the SFWMD which is completing its review.

The Navy has still not conducted any hydrology studies addressing issues of drainage, possible contamination of stormwater runoff, possible contamination of Florida Bay and impact on the Lens aquifer underlying Peary Court. The Navy regards these as design rather than environmental issues, to be resolved when construction is underway.

Purlegton Howanitz, Director of Public Works for the City and an expert in water, water quality, stormwater,

and drainage systems, has expressed concern about stormwater runoff in the vicinity of Peary Court. In particular, there is flooding of Palm Avenue at the intersection of White Street from 1980 to the present as a result of stormwater runoff. (Howanitz Aff., Exh. 5, at 1-3) Howanitz testified that the runoff will be exacerbated if Peary Court is built. (Howanitz Deposition at 34, 60-62) Theodore C. Strader, an expert in City Planning, concurs. (Strader Deposition, Exh. 9, at 69-70; Exh. BB, at 10-11, 14-15) The construction of houses and parking areas will likely contaminate the Lens aquifer. (Exh. BB, at 18-25)

V. HISTORIC DISTRICT

In the Cultural Resources section, the EA states that "[c]ompliance with requirements for juxtaposition of new construction with the Historical District will be ensured." (AR 45) The EA also states that the Historic District will be taken into consideration in the design of the housing units, under "Land Use and Visual Resources." (AR 45)

During 1988, meetings and discussion of building plans were held between representatives of the Navy and the City, which included members of the Historical Architectural Review Commission ("HARC") and the Historic Florida Keys Preservation Board ("Preservation Board"). (AR 52, 53, 54, 66, 83, 89) The Navy now takes the position that the Peary Court project's compatibility with the Historic District has been assured through coordination between the Navy and the Florida State Historical Preservation Office ("SHPO"). (AR 91, 92, 100,

102, 107, 113-4, 123, 125, 135, 137, 149, 152, 162, 167, 176, 178-79, 181-82, 184-85, 193 211, 228-29)

In accordance with § 106 of the NHPA, the Navy entered into a Memorandum of Agreement ("MOA") with SHPO and the Advisory Council in November 1990. (AR 149) Among other things, the Navy agreed that archeological and traffic studies would be prepared; that SHPO and the City would review the proposed housing, landscaping, and road improvement plans; and that the architectural design of the proposed housing would be compatible with the adjacent historic district. (AR 149) After this suit was filed, and in accordance with the MOA, the Navy forwarded the project design to the City and SHPO for review on November 5, 1991. (AR 224, 225) Comments were returned on December 20, 1991. (AR 231) The Navy took the SHPO/City comments into account, including a meeting with SHPO staff on January 17, 1992. (Exh. R; Exh. 2) A few weeks ago, on February 18, 1992, SHPO responded that the project was "consistent with the Secretary of Interior's Standards for Rehabilitation ." (Exh. 24)

Sharon L. Wells, an expert in history and historic preservation, has said that the architecture of the Peary Court project is incompatible with the Historic District. (Wells Aff., Exh. 12, at 54) She stated that added vehicles from the families living in Peary Court will exacerbate traffic conditions in the Historic District. (Wells Aff. at 8) Eugene E. Burr, an expert in planning and architecture, believes that the changed traffic patterns will have a significant impact upon the Historic District. (Burr Deposition, at 41-43)

VI. ALTERNATIVE SITES

In terms of alternatives to the Peary Court site, the EA states simply:

> B. Locate on another site
> This alternative was rejected because there is no other Navy-owned land available that has the advantages of the preferred site. Non-Navy land is practically non-existent and would require the expenditure of capital funds for land purchase.

(AR 45)

Plaintiff complains that the Navy did not adequately take into account the alternatives to building at Peary Court. The Navy prepared a Case Alternative Report which analyzed all reasonable alternatives in the Key West area. (AR 114)(not dated) The report considers sixteen possibilities to provide the required housing, including Peary Court and other potential sites, as well as alternative means of obtaining housing (e.g., purchase of existing housing). (AR 114) In August 1990, this report was distributed for review to SHPO, NAS Key West, the City, HARC, the Historic Florida Keys Preservation Board, and the Advisory Council on Historic Preservation. (AR 113, 114)

VII. TREES

Under Biological Resources, the EA notes and the Court finds that the only substantial vegetation on the site is trees; that no threatened or endangered species of

plant life or wildlife occupy the site; and that no wetlands will be impacted. (AR 45)

The Navy states that as early as October 1988 made a commitment to preserve the trees on the site and so notified HARC. (AR52) The Navy's contractor will be required to build around existing trees at Peary Court, and all protected trees will remain undisturbed. (AR 234)

A number of the Plaintiff's affiants expressed concern that the Peary Court project could result in the loss of valuable "specimen trees." (Wells Aff. at 6-7; Burns Aff. at 3; Stewart Aff. at 3)

VIII. TRAFFIC

The EA states that there will be an increase of approximately 240 vehicles utilizing the streets in and around Peary Court, but that there should be no significant increase in traffic congestion because the roads will be relocated and realigned. (AR 45)

The City submitted several proposed traffic circulation plans to the Navy which were duly considered. (AR 54, 66) The City's proposal to move the Palm Avenue entrance and exit was endorsed by NAS Key West. (AR 54) After Plaintiff filed this suit, the Navy in October 1991 produced a document called "Traffic Impact Study for Peary Court Housing Area Trumbo Point Annex NAS Key West, Florida" ("Traffic Study"), which concluded that traffic conditions would improve on White Street and worsen slightly on Palm Avenue, that the proposed design would reduce cut-through and

commercial traffic while adding a small amount of residential traffic in the area of White and Southard Streets, and that the only significant traffic effect of the project would be the reduction of traffic on Southard Street. (AR 229) This Traffic Study, which was conducted four months after the litigation was commenced, was distributed for review to SHPO, NAS Key West, the City, and the Advisory Council on Historic Preservation. (AR 226-28)

David A. Ornstein, A.I.C.P., an expert in planning, testified that Palm Avenue, between North Roosevelt Boulevard and White Street, was overburdened with traffic in 1987 and has the State's lowest level of service at present. (Ornstein Aff., Exh. AA, at 11-14; Ornstein Deposition, at 35) It was his opinion that the addition of traffic from the new families will have a significant impact on the already overburdened Palm Avenue. (Ornstein Aff. at 14, Strader AFF., Exh. BB, at 3-4)

Mr. Strader testified that the Navy Study is inaccurate because normal traffic flows during the study had been interrupted for unrelated highway construction along Roosevelt Avenue, making the Traffic Studies' figures unreliable. Further, Strader states that the negative traffic impact in this area is unavoidable. Palm avenue cannot be widened because it flows into the narrow Palm Avenue Bridge. (Strader Aff. at 5, 8-10)

IX. PROTECTION OF ARCHEOLOGICAL REMAINS

As agreed in the MOA, an archeological survey was carried out pursuant to Department of Interior procedures. (AR 181, "Executive Summary") (dated Mar.

6, 1991) The report of the investigation called for preservation and maintenance of an area that had been the previous site of a cemetery , a well at cistern 10, and an area of suspected wells under the loop road. (AR 181 at 38, 39; AR 182) As a result of this archeological survey, the cemetery will be protected. (AR 181, 182) SHPO gave its approval and concurred in the matter in March, 1991 (AR 184). Plaintiff agrees that its concerns have been satisfied. (Burr Deposition, Exh. 3, at 34; Wells Deposition, Exh. 12, at 32-33)

CONCLUSIONS OF LAW

I. STANDARD OF REVIEW

Before the Court undertakes a substantive review of the requirements of NEPA, it is necessary to determine the appropriate standard of review. The Eleventh Circuit has reviewed a federal agency's decision not to prepare an Environmental Impact Statement under "a standard of reasonableness," specifically rejecting the more narrow "arbitrary and capricious" standard. See C.A.R.E. Now, Inc. v. Federal Aviation Admin., 844 F.2d 1569, 1572 (11th Cir.), reh'g denied en banc 854 F.2d 1326 (1988). The court concluded that NEPA required a higher level of review than that ordinarily employed in reviewing agency action under the Administrative Procedure Act. [1] Id. at 1572-73 n.3. Using that level of

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[1] 5 U.S.C. § 706(2)(A) provides that the "reviewing court shall . . . set aside agency action, findings and conclusions found to be -- arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law."

scrutiny, the court found that the Federal Aviation Administration's issuance of a Finding of No Significant Impact for an airport runway extension project was reasonable, setting out its mission by stating: "[O]ur task is not to choose the best alternative, but to ascertain that the FAA made a 'reasoned choice' among these alternatives." Id. at 1574. The court analyzed the merits of each proposed alternative considered by the FAA before the agency reached its conclusion. Thus, while the court accorded broad discretion to the agency in selecting the best option, the procedure by which that decision was made was subjected to review. The FAA was compelled to justify the reasoning and factual conclusions contained in its EA and subsequent FONSI.

Since C.A.R.E. was decided, the Supreme Court has held in March v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1989), that the appropriate standard of review of an agency's determination not to prepare a supplemental EIS is the "arbitrary and capricious" standard. The Eleventh Circuit subsequently adopted this standard for determining the adequacy of an EIS. See North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990).

In practice, the standards tend to merge. As the Supreme Court has noted, the difference between the two standards is "not of great pragmatic consequence. [O]ur decision today will not require a substantial reworking of long-established NEPA law." Marsh, 109 S. Ct. at 1861 n.23 (citations omitted); see also Manasota-88, Inc. v. Thomas, 799 F.2d 687, 692 n.8 (11th Cir. 1986) (difference between standards is "often difficult to discern"). Under either standard, the reviewing court

must "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'" Marsh, 109 S. Ct. at 1861.

The Court's role in this case is thus carefully circumscribed. The merits of the Peary Court proposal per se are not before the Court. Nor may this Judge call into question any reasonable agency methodologies used in arriving at its conclusion. Rather, the Court's review is limited to ensuring that the process that produced the result complies with NEPA. The Court is obligated to scrutinize the analysis and conclusions reached in the EA for evidence of such compliance.

II. EVALUATION OF THE ENVIRONMENTAL ASSESSMENT AND FONSI

A. Inadequacy of Environmental Assessment

The original EA prepared for the Peary Court Project consists of eight typewritten pages, exclusive of three area maps, with just over two pages devoted to "Environmental Consequences." Each of the potential environmental impacts addressed therein is dismissed in conclusory "findings," without further discussion or even citation.[2] The FONSI itself simply restates the conclusions of the EA. (AR 67)

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[2] The EA is attached to this Order as an exhibit. Unnumbered pages 8 and 9 contain the Navy's discussion of environmental consequences. The impacts are dismissed in short paragraphs of no more than a few sentences. The Navy makes the following statements, with little or no further elaboration:

The District of Columbia Circuit has established four useful criteria for reviewing an agency decision to forego preparation of an EIS: (1) whether the agency took a "hardlook" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that the changes in the project sufficiently reduced it to a minimum. See Cabinet Mountains

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A. Biologic Resources. "No significant biologic impacts would result from construction on this site."

B. Noise. "There will be no significant increase in noise generated by this project."

C. Air. "There will be no significant increase in air pollution due to the proposed action."

D. Hydrology. "Drainage can be handled through the existing system with minor improvements."

E. Cultural Resources. "Because there are no significant cultural resources on the land proposed for the action, no significant impacts to cultural resources are expected. Compliance with requirements for juxtaposition of new construction with the Historical District will be ensured."

F. Traffic and Circulation. "Although there will be an increase in approximately 240 vehicles utilizing the streets and intersections around Peary Court, there should be no significant increase in traffic congestion."

Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982)(citation omitted).

Carefully comparing the procedure followed by the Navy in preparing the EA on Peary Court with what is required by law, see id. at 682, leads to the inescapable conclusion that the September 1988 EA was wholly inadequate. Far from the requisite "hard look," the Navy barely took any look at the environmental consequences of the project in the EA. Because the EA does not evince a good faith effort to "study and identify" relevant problems and alternatives, any analysis of whether the Navy "convincingly" established the insignificance or planned mitigation of environmental harms would be pointless. There is no formal study, informal documentation, or even informal agency discussion referenced in the EA. Because the EA does not state that any other agency or organization was involved or consulted in its preparation, the Court concludes that this did not occur. As to each potential impact, the EA merely restates its own ultimate conclusion that no problems will result from any of the contemplated action. Alternatives are not specifically mentioned, but for a two-sentence dismissal of the option, "Locate on Another Site."

The Navy prudently does not attempt to defend this action solely on the adequacy of the EA. Indeed, the Mayor of Key West, as amicus curiae testifying in favor of the construction of military housing on the site, noted: "[i]f all the Court had to look at was the original Environmental Assessment from 1988, the Court would have to find that the decision to reconstruct the military

housing at Peary Court was arbitrary and capricious." Prop. Fin. Ord. and Op. at 8.

The Court finds that the 1988 EA prepared by the Navy fails to meet the requirements of NEPA.

B. "Cure" by Subsequent Documentation

The Navy and amicus argue that the studies, surveys, and investigations conducted after the decision was made to proceed with the Peary Court project "cure" any defects in the original EA. Defendants contend that these studies, taken together, satisfy the requirement for preparation of an EA, and support the 1988 Finding of No Significant Impact. Plaintiff responds that the subsequent studies, reports, analyses, performed after the fact, cannot and do not cure the defective EA. Plaintiff urges the Court to order the Defendants to prepare an a full EIS, because the project will have a significant impact on the environment.

Resolution of the controversy cuts to the heart of NEPA's mandate. A review of NEPA and the EA's role in the statutory scheme is necessary before the Court considers the Navy's theory that its subsequent studies and analyses meet the statutory requirements, thus "curing" the EA.

1. NEPA and Regulations Promulgated Thereunder

The National Environmental Policy Act of 1969 sets forth a "national policy which will encourage productive and enjoyable harmony between man and his environment [and] promote efforts which will prevent or

eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321.

The Eleventh Circuit has recently explained the genesis and overall approach of the Act::

> Prior to the passage of [NEPA], environmental considerations were systematically underrepresented in the federal agency decision making process. Consistent with traditional notions of natural resource allocation, the benefits of development were overstressed and less environmentally damaging alternatives for meeting program objectives were often given limited consideration. NEPA declares a broad national commitment to protecting and promoting environmental quality. This commitment is implemented by focusing government and public attention on the environmental effects of proposed agency action; The Act ensures that important environmental consequences will not be "overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." In short, NEPA requires that the evaluation of a project's environmental consequences take place early in the project's planning process.

North Buckhead, 903 F.2d at 1539-40 (emphasis added)(citation omitted).

NEPA does not set out substantive environmental standards, nor prescribe any regulatory program. Rather, the congressional mandate of § 4321 is realized through a set of "action forcing" procedures that require an agency to take a "hard look" at environmental consequences. Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978) (mandate to agencies under NEPA is "essentially procedural"). The procedural requirements derive from 42 U.S.C. §4332 (2)(C)(i-iv), which directs all agencies of the federal government to prepare for "major Federal actions" a detailed statement on (1) the environmental impact of the proposed action; (ii) any unavoidable adverse environmental effects if a project is implemented; (iii) alternatives to the proposed action; (iv) the relationship between short-term uses of the environment and maintenance of long-term productivity; and (v) any irreversible and irretrievable commitments of resources involved in the project's implementation.

Pursuant to Executive Order,[3] the Council on Environmental Quality was directed to promulgate regulations binding on all federal agencies for the implementation of NEPA. These regulations, promulgated in late 1978, codified and clarified much of the established procedure under the statute. The first step in the compliance process is the preparation of an

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[3] See Executive Order 11514 (Mar. 5, 1970) as amended by Executive Order 11991 (May 24, 1977).

"Environmental Assessment," defined in relevant part as "a concise public document . . . which serves to: Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact[; and] Shall include brief discussion of the need for the proposal, of alternatives as required by [§ 4332(2)(E)] of the environmental impacts of the proposed action and the alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9 (1991).

Based on the EA, an agency decides whether to prepare an "Environmental Impact Statement." 40 C.F.R. § 1501.4(c). An EIS is an exhaustive analysis of the impacts, proposed mitigation, and alternatives to the federal project, which has been circulated to other involved agencies, see §1502.19, subject to public comment and agency response, see §1503, reviewed by the CEQ in case of interagency disagreement, see § 1504, and ultimately submitted to the President. The EIS, therefore, is the primary vehicle for compliance with NEPA where a project will have a significant impact on the environment. The EIS is the "action forcing" device envisioned by Congress to ensure that NEPA's policies and goals are infused into federal decisionmaking. 40 C.F.R. § 1502.1

Therefore, the EA is a fundamental crossroads in the process. Based upon the EA's analysis and conclusions, an agency may issue a FONSI, thereby terminating the NEPA process, or proceed to the next phase by preparing an EIS. In effect, the EA and decision to issue a FONSI based thereon remove an agency from further obligations under NEPA.

2. "Commit First, Ask Questions Later?"

Against this statutory background, it is clear that the Navy's theory of "cure" in this case would violate the letter and spirit of NEPA.

The documentation offered in support of the EA's "findings" was prepared after the EA and FONSI were issued. Indeed, Defendants' response to Plaintiff's interrogatories indicates that no written studies, analyses or reports on any environmental issue were prepared from the time the project was initially considered until the EA was issued in September 1988. Certain studies were conducted as the project went to bid; a traffic impact study was not conducted until October 1991, four months after this litigation was commenced. The record reflects that the analyses of environmental issues produced after the EA was issued are by-products of the myriad engineering and other technical studies conducted subsequent to the decision to build on the Peary Court site. The Navy argues that these studies support the agency's earlier finding of no significant impact.

Accepting the Navy's argument would render the EA/FONSI process a mere formality. As in this case, an agency could issue a perfunctory EA (and FONSI based thereon), and proceed with a project unhindered by further NEPA requirements. If challenged, the agency could support its pro forma EA with whatever studies were produced in the course of implementing the proposal. Any remaining environmental problems could

be resolved after the decision to go forward with the project were actually made.

This result is not what Congress intended. The Act's effectiveness depends on involving environmental considerations in the initial decision making process. See Robertson, 109 S. Ct. at 1845 (NEPA goals achieved during period when agency is "contemplating a major action"); see also 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays . . ., and to head off potential conflicts); 40 C.F.R. § 1500.1 ("NEPA procedures must insure that environmental information is available to public officials before decisions are made and before actions are taken"). In the NEPA context, post hoc compliance by definition does not accord with the congressional mandate. See Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989); Cady v. Morton, 527 F.2d 786, 794 (9th Cir. 1975).

The Court is not unaware of the onerous burden that this law places on an agency desiring to move forward efficiently and expeditiously. The law must nonetheless be followed.

The Navy has failed to demonstrate evidence of NEPA compliance before committing to the Peary Court project.

III. REMEDY

A. Remand

The preceding finding of a NEPA violation does not determine the appropriate remedy. Clearly, Congress did not intend that an agency have only "one bite at the apple" in attempting to comply with the statute. The Court now turns to equitable considerations.

The Navy's most persuasive argument against the injunctive relief sought by Plaintiff is that nothing but delay would be accomplished by a remand to the agency for further NEPA proceedings. Both during the Magistrate Judge's hearing and at trial, the Navy argued that subsequent studies confirmed the findings of the EA. Remand, Defendants suggest, would be pointless because each potential harm of concern to Plaintiff was either insignificant or mitigated as the design of the project progressed. See Defs' Mem in Opp. to Prel. Inj. at 17-27.[4]

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[4] Defendants cite two District of Columbia Circuit cases for the proposition that later analyses and mitigation measures that demonstrate that no issue remains for remand may be considered in reviewing an agency's NEPA compliance: Tongass Conserv. Soc. v. Cheney 924 F.2d 1137, 1140 (D.C. Cir. 1991); Friends of the River v. F.E.R.C., 720 F.2d 93 (1983).

These case are inapposite. In both cases, the court found that the agency had considered the environmental consequences of the projects before implementation and during the planning stages. In the more substantive Friends of the River case, FERC issued an order after a final EIS was issued that addressed the environmental

The Court is mindful of the strong policy against sanctioning delay for the sake of procedural regularity. The facts of this case, however, require the Court to transcend such concerns, grant relief, and fashion a remedy.

While the Navy rested its case entirely upon the administrative record, Plaintiff offered credible expert testimony of uncorrected environmental problems at the Peary Court site. See, e.g., Findings of Fact at IV, V, & VIII. These experts took issue with the findings and conclusions of the studies relied upon by the Navy in support of its original EA. Both parties now urge the Court to determine from this conflicting evidence

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concerns raised by the plaintiff. The Court noted that the EIS would be deficient if not for the later order. The Court declined to remand because it "'would not aid the agencies' own [environmental] decision making process,' for that process has already occurred." 720 F.2d at 106 (citation omitted). Before implementation and in support of its later order, the agency "did make such an investigation, after receiving and responding to extensive comments from interested persons outside the agency, and FERC incorporated its finding in opinion accessible to the public - the July, 1982 order." Id. Friends of the River thus stands for the unremarkable proposition that an EIS may be amended by later agency consideration of environmental concerns during its decisionmaking. The Tongass court even more remarkably decided to consider an Addendum to an EIS, as plaintiff conceded the addition was indeed a part of the original EIS. 924 F.2d at 1140 n.1.

Additionally, it is important to note that both cases involved EIS's. The agencies therein had taken environmental considerations substantially into account. Such is not the case here, as the Navy's pro forma EA does not evince such NEPA compliance. The case for remand is certainly stronger where an agency had foreclosed NEPA considerations from its decisionmaking early on in the process.

whether the Peary Court project will have a significant impact on the environment, much as the agency properly should have done in the first instance.[5]

This determination, however, is appropriately made by the agency and not the Court. The Court's proper function at this point is not to make this substantive determination, but rather to ensure that the agency reasonably took account of all of the environmental consequences of its action before making the decision to proceed.[6] The Court makes the limited finding here that based on Plaintiff's evidence adduced in these proceedings, the agency at the time the EA was filed, failed reasonably to consider the environmental consequences of its decision to proceed as required by NEPA. Therefore, a remand to agency for further proceedings consistent with NEPA and this opinion is appropriate. The Navy will be ordered to prepare an adequate EA within forty-five days from the date of this Order.

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[5] Of course, a finding by this Court of significant impact would necessitate the preparation of an EIS. 42 U.S.C. § 4332(2)(C). A contrary ruling would affirm the EA and FONSI.

[6] If the EA had been properly prepared and the only issue in controversy was the subsequent FONSI, the Court's task would be different. In such a case, the Court appropriately determines whether the critical findings of the EA are supported, and whether the agency's decisions were reasonable. See, e.g. C.A.R.E, 844 F.2d at 1570.

B. Injunction

The Court finds that Plaintiff has satisfied the prerequisites to the injunctive relief sought.

Plaintiff has demonstrated that irreparable harm will result from construction of this project. As explained above, in the absence of an adequate EA, the Court is unable to determine if the project will have a significant impact on the environment. The Court is similarly unable to evaluate the Navy's mitigation measures. Therefore, in the absence of an injunction, Plaintiff may suffer the precise irreparable harms sought to be prevented by this action. Plaintiff has shown that serious and unresolved questions remain as relate to, inter alia, stormwater runoff and flooding, contamination of the Lens aquifer, increased traffic and congestion, and destruction of specimen trees and aesthetic resources. Irreparable harm results where environmental concerns have not been addressed by the NEPA process. See Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) (affirming injunction based on NEPA procedural lapse because "risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation").

The Court additionally finds that a balance of the harms favors the Plaintiff.[7] The construction of military

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[7] By Order dated March 6, 1992, this Court deferred ruling on Magistrate Judge Brown's Report and Recommendation of February 25, 1992 on Plaintiff's motion for a preliminary injunction. Because

housing at some site in the Key West area will be delayed only by the amount of time necessary to comply fully with NEPA. Compliance has been an obligation of the government since the inception of the project, and should have been built into the project schedule originally.[8]

FINAL DECREE OF INJUNCTION

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that the determination of Defendants to utilize the Peary Court site in the City of Key West for military housing is in violation of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq., and regulations promulgated thereunder, 40 C.F.R. §§ 1500 et seq. It is further

ORDERED and ADJUDGED that Defendants, its officers, servants, agents, employees and contractors, including but not limited to Caddell Construction Company, Inc., of Montgomery, Alabama, be and the same hereby are permanently RESTRAINED and

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this case has proceeded to a trial on the merits, the Magistrate Judge's Report and Recommendations not moot.

[8] Defendants have submitted an affidavit concerning the costs of delay from the construction contractor at the Peary Court site. Defendants entered into a contract with the construction company several months after this litigation was commenced, and were fully aware that delay would occur if Plaintiff prevailed. The harm from delay is a result of the Navy's failure to follow NEPA procedure, and subsequent establishment of its own construction schedule.

ENJOINED from commencement of construction of military housing at the Peary Court site located within the City of Key West, Florida or taking any other actions in furtherance hereof PENDING the preparation of an Environmental Assessment in conformity with 42 U.S.C. §§ 4321 et seq. and regulations promulgated thereunder, and consistent with this Opinion. Said Environmental Assessment shall be PREPARED and COMPLETED no more than forty-five (45) days from the date of this Order, but may at Defendant's option be completed in less time. The injunction granted hereby shall be DISSOLVED automatically by its expiration five (5) days from the date said Environmental Assessment is issued. Defendants may use, employ, and otherwise incorporate any previously prepared reports, analyses or studies in the preparation of said Environmental Assessment. It is further

ORDERED and ADJUDGED that this case be and the same hereby is DISMISSED. The Clerk of the Court shall CLOSE this case. The Court retains jurisdiction to enforce the provisions of this Final Order. It is further

ORDERED and ADJUDGED that each party shall bear its own cost and attorneys' fees of this litigation, as Defendants' litigation position was substantially justified. It is further

ORDERED and ADJUDGED that the Report and Recommendation of February 25, 1991 by and same hereby is MOOT.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida on this 30th day of March, 1992.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Magistrate Judge Stephen T. Brown
Via facsimile and mail:
Teresa Davenport, AUSA
Pauline H. Milius, Esq.
Joel Sachs, Esq.
Leonard Sands, Esq.

DEMAND FOR RELIEF FROM PETITIONER'S COMPLAINT FILED JUNE 4, 1991

f). Granting plaintiff costs of this action, including attorneys' fees.

g) Granting Plaintiff such other and further relief as to this Court may seem just and proper.

DATED White Plains, New York
June 4, 1991

YOURS, etc.,

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Coconut Grove, Florida 33133

By _____
LEONARD SANDS, ESQ.
(Florida Bar No. 257583)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PROTECT KEY WEST, INC., a Florida Not-for-Profit Corporation, d/b/a LAST STAND,	)	
Plaintiff,	)	Civil No. 91-10054-King
v.	)	
RICAHRD CHENEY, Secretary of Defense of the United States of America, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR AMENDMENT OF MARCH 30 ORDER

Defendants respectfully request that the Court amend its March 30 Opinion and Order in the following respect.

Under the section titled "Findings of Fact", the Opinion states that the Peary Court project "is a major federal action that will significantly affect the environment." Opinion at 4-5. This statement should be deleted from the Opinion.

In its opinion, the Court reviews the requirements for the preparation of an EA, and concludes that the Peary

Court EA is inadequate in its discussion of several environmental issues. Id. at 15-23. However, in its discussion under "Remedy", the Court explicitly refuses to determine whether the Peary Court project has significant impacts on the environment. Instead, the Court states that such determination "is appropriately made by the agency and not the Court." Id. at 25.

The "significantly affect" statement is also contrary to the remedy the Court has fashioned. The Court has directed the Navy to prepare an "Environmental Assessment in conformity with 42 U.S.C. §§ 4321 et seq. and regulations promulgated thereunder, and consistent with this Opinion." Id. at 27-28. Clearly, the preparation of an EA would be inappropriate if the Court had already found that the Peary Court project will "significantly affect" the environment. As the Court noted, the "finding by this Court of significant impact would necessitate the preparation of an EIS." Id. at footnote 5.

In conclusion, the "significantly affect" statement is inconsistent with both the Court's reasoning and remedy. It appears to have been included inadvertently, and the Opinion and Order should be amended to delete it.

Dated April 9th, 1992

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Defendants' Motion for Amendment of March 30 Order was served by U.S. mail upon the following attorneys of record on April 9th, 1992.

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PERTINENT TEXT OF 28 U.S.C. § 2412

28 U.S.C. § 2412. Costs and fees

. . .

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

. . .

(2) For the purposes of this subsection–

. . .

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

. . .

(2)

Supreme Court, U.S.
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No. 93-1363

In the Supreme Court of the United States

OCTOBER TERM, 1993

PROTECT KEY WEST, INC., D/B/A LAST STAND,
PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, where a complaint includes a demand for attorneys' fees, the district court must wait for the submission of an application for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412(d), before finding the position of the government substantially justified.

2. Whether the district court abused its discretion in finding that the position of the government was substantially justified.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Clifton v. *Heckler*, 755 F.2d 1138 (5th Cir. 1985)	6
INS v. *Jean*, 496 U.S. 154 (1990)	6, 7
Myers v. *Sullivan*, 916 F.2d 659 (11th Cir. 1990)	5-6
Pierce v. *Underwood*, 487 U.S. 552 (1988)	6

Statutes and rules:

Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*	2
Equal Access to Justice Act, 28 U.S.C. 2412(d)	3
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*	2
Fed. R. App. P. 4(a)	4
Fed. R. Civ. P.:	
Rule 59(e)	3, 4
Rule 60(b)	4

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 1a), but the judgment is noted at 11 F.3d 166 (Table). The initial opinion of the district court (Pet. App. 9a-39a) is reported at 783 F. Supp. 546. The two subsequent decisions (Pet. App. 2a-4a, 5a-6a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. The petition for a writ of certiorari was filed on March 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Petitioner is a non-profit environmental group located in Key West, Florida. On June 4, 1991, petitioner filed suit against respondents in the United States District Court for the Southern District of Florida, alleging violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, regulations implementing NEPA, and the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.* The alleged violations con-cerned the Navy's preparation of an Environmental Assessment (EA) for a housing project known as Peary Court, located in Key West, Florida. Petitioner's complaint included a demand for attorneys' fees and costs. Pet. App. 10a, 40a. The Navy responded that studies, surveys and investigations conducted after the decision was made to proceed with the Peary Court project "cured" any defects in the original EA. Gov't C.A. Br. at 7-8.

The district court referred petitioner's motion for a preliminary injunction to a magistrate judge for a report and recommendation. The magistrate judge recommended denial of preliminary injunctive relief and petitioner subsequently moved the district court for a temporary restraining order (TRO). Pet. App. 11a. The district court granted a TRO preventing the Peary Court project from going forward and held a trial on the merits. *Ibid.*

On March 30, 1992, the district court issued its opinion and order. The court held that the Navy's EA was inadequate and required the Navy to prepare a new "Environmental Assessment in conformity with 42 U.S.C. §§ 4321 *et seq.* and regulations promulgated thereunder." Pet.

App. 37a-39a.[1] In concluding its March 30 Order, the court declared the case "dismissed," ordered the Clerk of the Court to "close this case," and stated that "each party shall bear its own cost and attorneys' fees of this litigation, as Defendants' litigation position was substantially justified." *Id.* at 38a.

b. Petitioner did not file a motion to alter or amend the judgment. See Fed. R. Civ. P. 59(e). Nor did petitioner file a notice of appeal within 60 days of the district court's opinion and judgment. Pet. App. 38a; see Fed. R. App. P. 4(a). Instead, petitioner filed an application for $36,691.87 in attorneys' fees on May 14, 1992. Pet. Application for Attorneys' Fees at 1. Petitioner sought fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), which provides that a court "shall award to a prevailing party other than the United States fees and other expenses * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make the award unjust."

Petitioner's application for EAJA fees was supported by an affidavit from Joel H. Sachs, one of petitioner's attorneys. Mr. Sachs averred that petitioner was entitled to attorneys' fees because "[a] review of the record will disclose that plaintiff was the prevailing party and that

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[1] The March 30 Order also stated that the Peary Court project "is a major federal action that will significantly affect the environment." Pet. App. 13a. On April 9, 1992, the Navy filed a "Motion for Amendment of March 30 Order" requesting that the court delete this language as inconsistent with the ultimate remedy required by the court and with the court's holding elsewhere in the opinion that it would not determine whether the project has significant impacts on the environment. *Id.* at 41a-42a. On April 10, 1992, the district court amended the sentence in the opinion to read: "[t]he Court finds that this project, known as Peary Court, is a major federal action." *Id.* at 7a-8a.

the litigation position of the defendants was not substantially justified." Affidavit of Joel H. Sachs at 3. The government opposed petitioner's application, arguing that the district court had already held that the litigation position of the government was substantially justified and that petitioner had failed to move to alter or amend the court's judgment within the time allowed by the Fed. R. Civ. P. 59(e).

On May 26, 1992, the district court denied petitioner's application for attorneys' fees. Pet. App. 5a-6a. The court explained that in its prior order it had "found that [the] defendant's litigation position was substantially justified." *Id.* at 5a.

c. Six weeks later, petitioner filed a motion, pursuant to Fed. R. Civ. P. 60(b), for relief from the May 26 Order denying attorneys' fees. Petitioner alleged that the district court should have awarded it attorneys' fees because neither the underlying agency actions nor the litigation position of the government was substantially justified. The court denied petitioner's motion in an Omnibus Order on Plaintiff's Motion for Reconsideration, Pet. App. 2a, which again found that "the government's position was substantially justified in these proceedings." *Id.* at 3a. The court held that "[t]he government's theory of 'cure,' although ultimately rejected by this Court, had a reasonable basis in law and fact." *Ibid.*

2. Petitioner appealed from the district court's order of May 26, 1992, and "Omnibus" order of August 13, 1992. The two appeals were consolidated by the court of appeals.[2]

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[2] The United States did not appeal the court's NEPA holding, but instead prepared a new EA pursuant to the court's order. Petitioner challenged this new EA but the district court ruled that

Petitioner contended before the court of appeals that the district court abused its discretion by denying petitioner attorneys' fees "for the sole reason that the government's litigation position was substantially justified." Pet. C.A. Br. 1. Petitioner urged that the Navy's underlying actions were unreasonable and that attorneys' fees should therefore have been awarded. *Id.* at 8.

The government responded that petitioner's failure to take a timely appeal from the district court's holding that the litigation position of the government was substantially justified barred appellate review of that finding. In the alternative, the government argued that both the government's underlying actions and its litigation position were substantially justified.

The court of appeals affirmed without opinion. Pet. App. 1a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 5-8) that the district court did not have jurisdiction over its attorneys' fee demand until it submitted a separate application for attorneys' fees, and that the district court's initial finding that the litigation position of the government was "substantially justified" was therefore without effect. In support of this argument petitioner (Pet. 6) relies on a number of cases that have held that a timely application for EAJA fees is a jurisdictional prerequisite to an award of attorneys' fees. See, *e.g.*, *Myers* v. *Sullivan*,

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the EA was adequate. *Protect Key West* v. *Cheney*, No. 92-10043, Order of Sept. 30, 1992 (S.D. Fla.).

916 F.2d 659, 666 (11th Cir. 1990); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985). However, none of the cases cited by petitioner considers the issue raised here: whether a district court may determine that the position of the government is substantially justified prior to the submission of a separate application for attorneys' fees, when the plaintiff has included a demand for fees in its complaint.[3] Nor has our research uncovered any other decision addressing this issue. Since petitioner's complaint included a demand for attorneys' fees, the district court's decision to rule on that request was entirely reasonable.

2. Petitioner also errs in contending (Pet. 8) that the district court's denial of attorneys' fees conflicts with this Court's decision in *INS* v. *Jean*, 496 U.S. 154 (1990), because the district court did not consider whether the agency's actions were substantially justified in assessing petitioner's motion for attorneys' fees. Petitioner asserts (Pet. 9) that the district court's judgment on the merits "belies any assertion that the agency's actions were substantially justified under 28 U.S.C. § 2412(d)(1)(A)." The district court expressly found, however, that "the government's position was substantially justified." Pet. App. 3a. This finding was fully supported by the record before the district court.

This Court has held that the government's position is substantially justified if it has a reasonable basis in law and fact. *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). The position need not be "justified to a high degree";

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[3] None of the cases relied on by petitioner in this Court for the proposition that the district court lacked jurisdiction over the fee request until a fee application was filed was cited to the court of appeals. See Pet. C.A. Reply Br. In fact, petitioner barely raised this jurisdictional argument in the court of appeals. *Id.* at 4-5.

rather, it only need be " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Ibid.* A "position can be justified even though it is not correct, and * * * can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2.

Here, the Navy's good faith belief, from the commencement of the Peary Court project and throughout the litigation, was that the post-EA studies were sufficient to "cure" any deficiencies in the original EA and to fulfill the requirements of NEPA. The Navy's position on the adequacy of the EA was not revised for the purposes of litigation; that position was the same before and after petitioner's lawsuit was filed. As the district court noted, "the Navy rested its case entirely upon the administrative record." Pet. App. 34a. Thus, the justification for the agency's action and the justification for its litigation position were identical. As the district court recognized, the Navy's "theory of 'cure' " underlay *both* the agency action and its subsequent litigation position. *Id.* at 3a. The Navy's good-faith belief that it had "cured" any defects in the original EA made the Navy's position, as to both the agency action and the litigation, "substantially justified" for the purposes of EAJA.

This Court has held that " 'position' * * * may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions," but "only one threshold determination for the entire civil action is to be made." *Jean*, 496 U.S. at 159. Thus, the district court did not abuse its discretion by not making a separate finding on whether there was substantial justification for the Navy's actions prior to the litigation. In any event, the district court's finding that the Navy's theory of "cure" was substantially

justified is a case-specific factual determination that does not warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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